

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ORIN TURNER,	§
	§ No. 16, 2011
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for Kent County
STATE OF DELAWARE,	§ Cr. ID No. 0609012387A
	§
Plaintiff Below-	§
Appellee.	§

Submitted: July 29, 2011
Decided: September 8, 2011

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices

ORDER

This 8th day of September 2011, upon consideration of the briefs of the parties and the record below, it appears to the Court that:

(1) The defendant-appellant, Orin Turner, filed an appeal from the Superior Court's December 20, 2010 order adopting the October 29, 2010 report of the Superior Court Commissioner,¹ which recommended that Turner's first motion for postconviction relief pursuant to Superior Court Criminal Rule 61 be denied.²

We find no merit to the appeal. Accordingly, we affirm.

¹ Del. Code Ann. tit. 10, §512(b); Super. Ct. Crim. R. 62.

² Because this was Turner's first motion for postconviction relief and his motion contained allegations of ineffective assistance of counsel, the Superior Court requested Turner's trial counsel's affidavit. Super. Ct. Crim. R. 61(g)(1) and (2); *Horne v. State*, 887 A.2d 973, 975 (Del. 2005).

(2) The record reflects that, in October 2007, Turner was found guilty by a Superior Court jury of Assault in the First Degree, Aggravated Menacing, Burglary in the Second Degree, Reckless Endangering in the First Degree, Carrying a Concealed Deadly Weapon and four counts of Possession of a Firearm During the Commission of a Felony. Turner was sentenced as a habitual offender³ to two life terms plus an additional eighty-seven years at Level V incarceration. On direct appeal, this Court affirmed Turner's convictions.⁴

(3) In this appeal from the Superior Court's denial of his first motion for postconviction relief, Turner claims that a) his trial attorney provided ineffective assistance by failing to object to the composition of the jury and the absence of the crime victim at trial; b) his appellate counsel provided ineffective assistance by failing to raise those issues on appeal; c) the prosecutor failed to produce at trial the photo array shown to the victim; d) the testimony of the police detective at the suppression hearing was false; e) the prosecutor engaged in misconduct in his closing argument; and f) the trial court abused its discretion when it denied the defense motion for judgment of acquittal with respect to the aggravated menacing charge. To the extent that Turner fails to present claims in this appeal that were

³ Del. Code Ann. tit. 11, §4214(a).

⁴ *Turner v. State*, 957 A.2d 565 (Del. 2008).

raised previously, any such claims are deemed to be waived and will not be addressed by this Court.⁵

(4) Turner's first two claims involve allegations of ineffective assistance of counsel. In order to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's representation fell below an objective standard of reasonableness and that, but for his counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceedings would have been different.⁶ Although not insurmountable, the Strickland standard is highly demanding and leads to a strong presumption that the representation was professionally reasonable.⁷ The defendant must make concrete allegations of ineffective assistance, and substantiate them, or risk summary dismissal.⁸

(5) In his first claim, Turner alleges that his trial counsel was ineffective for failing to object to the composition of the jury. According to Turner, his constitutional rights were violated because he was found guilty by a jury chosen on the basis of racial discrimination.⁹ Turner also alleges that his trial counsel was ineffective for failing to object to the absence of the victim at trial. According to

⁵ *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993). In his motion for postconviction relief filed in the Superior Court, Turner also claimed that his confession was coerced by police.

⁶ *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

⁷ *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990).

⁸ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

⁹ *Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986).

Turner, the jury could not have found him guilty of aggravated menacing without her live testimony. Neither of these claims has merit.

(6) First, the record reflects that the State did not utilize any peremptory strikes during jury selection. As such, *Batson* is not implicated¹⁰ and, therefore, Turner's counsel was not ineffective for failing to object to the composition of the jury on that basis. Second, Turner's counsel did move for judgment of acquittal on the ground that the victim was not present for trial. The Superior Court properly denied the motion on the ground that the testimony of the victim's minor son and boyfriend was sufficient for the jury to find that the victim was in fear of imminent physical injury¹¹ when Turner pointed a gun at her.¹²

(7) Turner's second claim that his appellate counsel was ineffective for failing to raise on direct appeal the alleged *Batson* violation and the absence of the victim at trial is, likewise, meritless. Turner's appellate counsel may not be faulted for failing to raise on direct appeal claims with no factual or legal basis. In the absence of any evidence that Turner's counsel committed error that resulted in prejudice to him, we conclude that the Superior Court correctly denied his claims of ineffective assistance of counsel.

¹⁰ *Jones v. State*, 938 A.2d 626, 631 (Del. 2007) (citing *Robertson v. State*, 630 A.2d 1084, 1089 (Del. 1993)).

¹¹ Del. Code Ann. tit. 11, §602(b).

¹² *Lewis v. State*, Del. Supr., No. 364, 2004, Steele, C.J. (Feb. 22, 2005).

(8) Turner's third claim is that the prosecutor failed to produce at trial the photo array shown to the victim. Because this claim was never raised at trial, it is procedurally defaulted under Superior Court Criminal Rule 61(i) (3). The claim is without merit in any case. The record reflects that neither the prosecution nor the defense chose to introduce the photo array into evidence at trial. Turner does not explain how the photo array would have assisted his defense. The photo array was not necessary for the State's case, since identity was not an issue. Turner admitted firing a gun in the victim's apartment. The only question was whether the death of the shooting victim was accidental or not. As such, we conclude that the Superior Court correctly denied this claim.

(9) In his fourth claim, Turner alleges that the police detective's testimony at the suppression hearing was false. Because this claim was previously adjudicated on direct appeal, it is procedurally barred under Rule 61(i) (4). In the absence of any evidence that reconsideration of the claim is warranted in the interest of justice,¹³ we conclude that the Superior Court properly denied this claim.

(10) Turner's fifth claim is that the prosecutor engaged in misconduct during his closing argument. Because the claim was never raised at trial, it is procedurally defaulted under Rule 61(i) (3). It is without merit in any case. There

¹³ Super. Ct. Crim. R. 61(i) (4).

is simply no factual basis for Turner's allegations of impropriety. In the absence of any evidence supporting Turner's claim or any showing of cause and prejudice,¹⁴ we conclude that the Superior Court properly denied the claim.

(11) Turner's final claim is that the Superior Court abused its discretion when it denied the defense motion for judgment of acquittal on the charge of aggravated menacing. As noted above, the Superior Court properly denied the defense motion for judgment of acquittal, since there was a sufficient evidentiary basis for the jury to conclude that Turner was guilty of aggravated menacing. Because we conclude that the Superior Court properly denied Turner's motion for postconviction relief, we will affirm the Superior Court's judgment.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

¹⁴ Super. Ct. Crim. R. 61(i) (3).